

# Post-adoption Photographs: Welfare, Rights and Judicial Reasoning

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*In Re J (A Child) (Adopted Child: Contact), the Court of Appeal minimised the effect of the Adoption and Children Act 2002 on post-adoption contact, continuing the restrictive approach taken to such contact before the Act commenced. The court refused to order that the natural parents should receive and retain an annual photograph of their former child. This commentary argues that the court was probably right to refuse that order, but that it is nevertheless troubling that the court did not give adequate consideration to the various rights and interests of the parties.*

## Introduction

There has been a significant change in practice with regard to post-adoption contact in recent decades. Rather than being considered anathema to the nature of adoption, such contact is positively encouraged by adoption agencies as part of the move towards a more ‘open’ form of adoption. One scholar claims that ‘[m]ost children now adopted in England and Wales are planned to have some form of contact with members of their birth family’.<sup>1</sup> Indeed, a Commission for Social Care Inspection report noted that: ‘[a]ll agencies involved birth families in ongoing contact arrangements to promote and maintain the child’s identity’.<sup>2</sup> This will often take an indirect form, such as ‘letterbox’ contact.<sup>3</sup> That said, it seems that the jurisprudence of the courts did not match this shift, and judges remained reluctant to impose conditions against the wishes of the adoptive parents when making a final order under the old Adoption Act 1976.

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<sup>1</sup> E Neil, ‘Post-Adoption Contact and Openness in Adoptive Parents’ Minds: Consequences for Children’s Development’ (2009) 39 *British Journal of Social Work* 5, at p 6.

<sup>2</sup> Commission for Social Care Inspection, *Adoption: Messages from Inspections of Adoption Agencies* (2006), at para 2.8.

<sup>3</sup> One adoption agency defines such contact as ‘an arrangement where adoptive parents, birth families and adopted children agree to exchange letters, photographs, cards and/or gift vouchers’, mediated by the agency: London Borough of Richmond Upon Thames, *Adoption Contact: Information for birth relatives* (date unknown), at p 2.

It was an open question whether the Adoption and Children Act 2002 would herald a new era of increased judicial willingness to encourage and impose post-adoption contact. The recent case of *Re J (A Child) (Adopted Child: Contact)*<sup>4</sup> answered that question in the negative. The case concerned the narrow point of whether the natural parents who had consented to the adoption of their infant could receive and retain an annual photograph of the child in the face of opposition from the adoptive parents. It nevertheless raised a number of interesting issues including: whether the Children Act 1989 or the Adoption and Children Act 2002 should govern applications for post-adoption contact; the extent to which the courts should impose orders for post-adoption contact contrary to the adoptive parents' wishes; whether an adoptive child and his or her natural parents retain a right to respect for family life *vis-à-vis* each other post-adoption; and whether the adoptive child's right to respect for private life is engaged by a court order requiring the disclosure of photographs of the child. These issues will be explored in this commentary. We do not argue that the court should have made the order sought by the natural parents in *Re J*. However, the depth of some of the court's analysis is disappointing, particularly in relation to the rights of the parties under Article 8 of the European Convention on Human Rights.

## The facts

A girl, J, was adopted at the age of two. In separate County Court proceedings commenced after the adoption order was made, J's natural parents<sup>5</sup> sought an order obliging the adoptive parents to provide an annual photograph of J. The natural mother, who had mental health problems and felt 'no hostility' towards the adoption itself,<sup>6</sup> found it 'reassuring' to keep an album of photographs of her children, and wanted to be able to show photographs of J to her older children with whom she had contact.<sup>7</sup>

The local authority, adoptive parents and Children's Guardian all opposed the application. The adoptive parents feared that the natural parents could use the photographs to locate the child (whose ethnic background apparently rendered her particularly recognisable), perhaps by publishing them on the internet. They were concerned that the adoption placement could be disrupted and relied on

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<sup>4</sup> [2010] EWCA Civ 581, [2011] Fam 31.

<sup>5</sup> The natural parents were separately represented by counsel, which caused the Court of Appeal some concern: see text to nn 44-45.

<sup>6</sup> *Re J* [2010] EWCA Civ 581, at [12].

<sup>7</sup> *Ibid*, at [12].

the natural mother's previous evasion of a local authority in respect of another child as evidence of this risk. They proposed that an annual photograph be made available at the local authority's offices for viewing, but not retention, by the natural parents. While they contemplated the possibility that photographs could voluntarily be made available for retention in the future, the adoptive parents made it clear that they would first require evidence that the natural parents had engaged with post-adoption services, particularly in the light of the natural mother's health problems. They wanted their status as J's parents to be recognised as 'inviolable'.<sup>8</sup> Moreover, the Children's Guardian was concerned about the possible effect on J if the adoptive parents were subjected to 'stress and anxiety' caused by the granting of the natural parents' application.<sup>9</sup>

The Official Solicitor (representing the natural mother) denied that there was any real risk of the placement being disrupted by virtue of the mother's retention of the photographs. It was submitted that there were 'genuine reasons' for her desire to have the photographs, and that being observed by a social worker while viewing them would cause her distress.<sup>10</sup>

### Judge Corrie's decision<sup>11</sup>

In an *ex tempore* judgment that did not refer to any authorities,<sup>12</sup> the judge at first instance made the order sought by the natural parents. This was in spite of his concession that some of the points made on behalf of the natural mother were mother-focussed and not child-focussed. Indeed, some aspects of his analysis did not sit well with his conclusion that the order should be granted.

Invoking section 1 of the Adoption and Children Act 2002, which sets out both the principle that the child's welfare is paramount and the relevant aspects of welfare that should be considered 'whenever a court...is coming to a decision relating to the adoption of a child',<sup>13</sup> Judge Corrie emphasised the importance of the stability of the placement. He saw the peace of mind, stability and safety of the adoptive parents as 'central to that of the child' and accepted that 'their concerns and

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<sup>8</sup> Ibid, at [11].

<sup>9</sup> Ibid, at [13].

<sup>10</sup> Ibid, at [12].

<sup>11</sup> The first instance judgment has not been made public, and the following summary is therefore compiled from extracts contained in the Court of Appeal decision.

<sup>12</sup> *Re J* [2010] EWCA Civ 581, at [15].

<sup>13</sup> Adoption and Children Act 2002, s 1(1).

their perceptions [were] genuine'.<sup>14</sup> Thus, he stated that he was willing to give the interests and wishes of the adoptive parents 'appropriate' and 'considerable' weight.<sup>15</sup>

Nevertheless, the judge still preferred the natural parents' case. He held that the fears of disruption voiced by the adoptive parents were 'understandable but rather farfetched', such that 'an essentially minor point ha[d] been allowed to assume far more significance than it really merit[ed] and fears ha[d] multiplied on themselves in a way which was not justified objectively'.<sup>16</sup> In the judge's view, while some sort of 'risk assessment' had to be carried out,<sup>17</sup> the risk of disruption was a 'very small one'.<sup>18</sup>

Conversely, Judge Corrie found that J had an interest in her natural parents maintaining a form of contact with her, about which she could be told at an appropriate point.<sup>19</sup> He made this finding in the light of the paramountcy principle as set out in both section 1 of the 2002 Act and its equivalent in the Children Act 1989, which applies more generally where a court determines a question relating to a child's upbringing.<sup>20</sup> He also held that the natural parents 'have some more than residual Article 8 rights which entitle them to something'.<sup>21</sup> The judge therefore made the order sought, permitting a practice that he considered both 'commonplace' and 'clearly valuable' to the natural mother to occur in the instant case.<sup>22</sup>

## The Court of Appeal decision<sup>23</sup>

The local authority appealed on a number of grounds, with the permission of Wilson LJ. He identified as arguable three specific aspects of the local authority's grounds of appeal. The first was that Judge Corrie should have reminded himself that it is unusual to grant a contact order contrary

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<sup>14</sup> [2010] EWCA Civ 581, at [15].

<sup>15</sup> Ibid, at [26].

<sup>16</sup> Ibid, at [17].

<sup>17</sup> Ibid, at [15].

<sup>18</sup> Ibid, at [17].

<sup>19</sup> Ibid, at [17].

<sup>20</sup> Children Act 1989, s 1(1)(a).

<sup>21</sup> [2010] EWCA Civ 581, at [17].

<sup>22</sup> Ibid.

<sup>23</sup> [2010] EWCA Civ 581.

to the adoptive parents' wishes. The second was that the judge had not given sufficient weight to the fact that the ability to place a photograph on the internet 'transforms its utility as a vehicle for tracing a child'.<sup>24</sup> The third was that 'irrespective of the objective level of risk of discovery, the disturbing effect of the order on the adoptive parents and the consequential risk of emotional destabilisation in their household clearly outweighs the, query debatable, value to [the child] of the natural parents having, rather than seeing, her annual photograph'.<sup>25</sup>

Lord Neuberger MR, Moses LJ and Munby LJ allowed the appeal. The Master of the Rolls gave the single judgment of the court. On the first issue, the court held that the judge had erred in failing to acknowledge that it is unusual to grant an order contrary to the adoptive parents wishes. Whilst the 'adoptive parents' wishes cannot be determinative or dispositive', the Court of Appeal held that the judge should have acknowledged that 'it is "extremely unusual" to make an order with which the adoptive parents are not in agreement'.<sup>26</sup> There was no reference to this in Judge Corrie's judgment and, in fact, the Court of Appeal found that his judgment was inconsistent with that position. The court asserted:

To say, as the judge did, that the adoptive parents' wishes and concerns must be given 'appropriate', even 'considerable', weight is one thing. It is a significantly different thing to say that it would be 'extremely unusual' not to give effect to the adoptive parents' refusal to agree.<sup>27</sup>

Thus the court concluded that Judge Corrie 'fell into error' on this point.<sup>28</sup>

Turning to the two other grounds of appeal, the court noted that Judge Corrie erred in asking whether the provision of a photograph would *create or increase* the risk that the natural parents would seek to disrupt the placement,<sup>29</sup> and should have asked 'whether the adoptive parents' fear of such a risk was *unreasonable* in the sense that it had no reasonable basis' (emphasis added).<sup>30</sup> The court explained that this approach is required by section 1 of the Children Act 1989 (the

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<sup>24</sup> Ibid, at [19].

<sup>25</sup> Ibid.

<sup>26</sup> Ibid, at [26].

<sup>27</sup> Ibid.

<sup>28</sup> Ibid, at [27].

<sup>29</sup> Ibid, at [28].

<sup>30</sup> Ibid.

paramountcy principle).<sup>31</sup> Unlike Judge Corrie, the Court of Appeal preferred to analyse this issue under the 1989 Act rather than the 2002 Act. Lord Neuberger accepted that the child's welfare 'in the early stages of her adoption depended upon the stability and security of her new parents, the adoptive parents' and that undermining 'that stability by fuelling or failing to heed [the adoptive parents'] fears that their daughter's natural parents might seek to trace her is to damage her welfare.'<sup>32</sup> The court was also persuaded by the adoptive parents' argument that their status as parents needs to be 'respected and seen to be inviolable' to give the child 'the very best chance for the adoption to be successful'.<sup>33</sup> Indeed, the Court of Appeal was mindful that 'the adoptive parents are the only people with parental responsibility for J' and 'unless the circumstances are unusual, indeed extremely unusual', the adoptive parents' responsibility for the child should not be usurped by the court.<sup>34</sup> Thus the court concluded that unless 'there was no conceivable risk, the fear of the adoptive parents...ought to have compelled the conclusion that the natural parents should not be given the photographs.'<sup>35</sup>

Whilst the Court of Appeal was critical of Judge Corrie's approach, the court (conscious of the need for an appellate court to take a cautious approach when faced with claims that a judge has fallen into error)<sup>36</sup> accepted Judge Corrie's factual findings.<sup>37</sup> Nevertheless, applying what the Court of Appeal regarded as 'the proper approach' to these facts it held 'that the application ought to have been dismissed'.<sup>38</sup> Thus the court discharged Judge Corrie's order.<sup>39</sup>

The court concluded its judgment with three final observations. First, in response to the local authority's argument that Judge Corrie too readily accepted that it was common practice that adoptive parents provide photographs, the court held that the prevalence or otherwise of this

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<sup>31</sup> Ibid, at [29].

<sup>32</sup> Ibid.

<sup>33</sup> Ibid, at [36].

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, at [31].

<sup>36</sup> Ibid, at [32].

<sup>37</sup> Ibid, at [34].

<sup>38</sup> Ibid, at [35].

<sup>39</sup> Ibid, at [37].

practice was ‘largely beside the point’.<sup>40</sup> Indeed, the relevant issue was not whether this was common, but the ‘frequency with which such orders are imposed, as here, on unwilling adoptive parents’.<sup>41</sup> The court was confident that this was ‘very far indeed from being commonplace’.<sup>42</sup>

The second matter was whether natural parents have an Article 8 right to respect for family life with respect to an adopted child. This is an important question, and the court refused to answer it definitively. Their reluctance is unsurprising in the light of the fact that they had not heard full argument on this issue. However, the court did note that ‘even if Judge Corrie was correct in assuming that the natural parents had Article 8 rights...those rights would not...have sufficed to tip the balance in...favour [of the natural parents]’.<sup>43</sup>

Finally, the court expressed concern about the fact that the natural mother and father were separately represented, as were the local authority and the children’s guardian – and that ‘as a result, two sets of full legal costs were incurred, all funded by public money, to support the case for and against the appeal’.<sup>44</sup> The court did not rule on this issue, but it noted that in future the court would expect ‘publicly funded legal advisers to consider the need for separate representation very carefully, and judges to make appropriate costs orders where it is unnecessarily undertaken.’<sup>45</sup>

## Issues

The case raises a number of significant issues. Some of these were not considered adequately, if at all, by the Court of Appeal. We begin our analysis by considering the application of the welfare principle in *Re J* before embarking on a study of the Article 8 rights to respect for private and family life that may have been possessed by the various parties. While none of these matters dictated a different result, the Court of Appeal’s approach was distinctly lacking in several respects.

### The application of the welfare principle in *Re J*

In this section we address two aspects of the Court of Appeal’s application of the paramountcy

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<sup>40</sup> Ibid, at [35].

<sup>41</sup> Ibid, at [40].

<sup>42</sup> Ibid, at [40].

<sup>43</sup> Ibid, at [43].

<sup>44</sup> Ibid, at [44].

<sup>45</sup> Ibid, at [50].

principle. First, we ask whether the Adoption and Children Act 2002 should have been applied to *Re J*, and whether it necessitated a change to the court's approach to post-adoption contact. We then consider whether the Court of Appeal deferred too readily to the wishes of the adoptive parents.

The relevance of the Adoption and Children Act 2002 to post-adoption contact

The judge at first instance and the Court of Appeal disagreed on the appropriate legislative basis on which to decide *Re J*. At first instance Judge Corrie cited both section 1 of the Children Act 1989 and section 1 of the Adoption and Children Act 2002, each containing a version of the 'welfare principle' to the effect that the child's best interests are the paramount consideration in decisions within their scope. However, the Court of Appeal was adamant that only the 1989 Act was relevant for the purposes of a decision relating to post-adoption contact where an adoption order has already been made. The disagreement between the courts is understandable, since the Children Act deals with contact in general while the Adoption and Children Act deals with adoption and purports to govern some forms of contact in that context.

The welfare test in section 1 of the 2002 Act has been said to reflect an 'extended meaning' of welfare,<sup>46</sup> since unlike the 1989 Act it specifically directs the court to consider the effect of ceasing to be a member of the birth family and the child's relationships with relatives as aspects of the child's welfare.<sup>47</sup> The 2002 version of the welfare principle is applicable where 'a court or adoption agency is coming to a decision relating to the adoption of a child'.<sup>48</sup> The concept of 'coming to a decision' is expressly stated to include decisions made in proceedings where the court might make or revoke an adoption order, a placement order or an order for contact *during placement* (i.e. before the making of a final adoption order),<sup>49</sup> as well as decisions on leave applications in respect of any action (other than the initiation of proceedings) that can be taken under the 2002 Act.<sup>50</sup> While section 26 of the 2002 Act purports to govern applications for contact during placement, the appropriate avenue for other contact applications (even one that is to be heard concurrently with the application for an adoption order) is seemingly section 8 of the 1989 Act. For example, section 26 of the 2002 Act is expressed not to 'prevent an application for a contact order *under section 8 of the 1989 Act* being made where the application is to be heard together with an application for an

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<sup>46</sup> *Re C (A Child) (Adoption: Duty of Local Authority)* [2007] EWCA Civ 1206, [2008] Fam 54 at [18] per Arden LJ.

<sup>47</sup> Adoption and Children Act 2002, s 1(4)(c) and s 1(4)(f).

<sup>48</sup> Adoption and Children Act 2002, s 1(1).

<sup>49</sup> Adoption and Children Act 2002, s 1(7)(a). Section 1(7)(a) also includes the variation of an order for contact during placement within the definition of 'coming to a decision'.

<sup>50</sup> Adoption and Children Act 2002, s 1(7)(b).



adoption order’ (emphasis added).<sup>51</sup> This is in spite of the fact that section 46 of the 2002 Act obliges the court to consider ‘whether there should be arrangements for allowing any person contact with the child’ before making the original adoption order.<sup>52</sup> Thus the Court of Appeal was correct to conclude that the appropriate welfare test was formally the one contained in section 1 of the 1989 Act and not that in section 1 of the 2002 Act.<sup>53</sup>

The Court of Appeal took the view that the judge’s error did not have ‘any discernible impact’.<sup>54</sup> But the welfare tests are different, and although the point was not explicitly addressed by the Court of Appeal in *Re J*, the applicability of the 1989 Act also means that the question of post-adoption contact was not directly subjected to the change in the importance of welfare heralded by the 2002 Act, whereby it became the ‘paramount’ rather than merely the ‘first’ consideration.<sup>55</sup> In other words, child welfare was the paramount consideration in post-adoption contact decisions even before the 2002 Act was introduced.

Having determined that the 1989 Act applied, rather than the 2002 Act, the Court of Appeal similarly rejected the straightforward application of its earlier decision in *Re P (Placement Orders: Parental Consent)*<sup>56</sup> to *Re J* on the basis that *Re P* concerned the 2002 Act.<sup>57</sup> While Judge Corrie did not cite any cases in the course of reaching his decision, the Court of Appeal’s rejection of *Re P* cemented the differences of approach between the two courts. *Re P* arguably suggested that the courts would modify their general approach to post-adoption contact in the light of the 2002 Act, even if the 1989 Act ultimately governs the matter. Lord Neuberger’s speech in *Re J* casts serious doubt on that suggestion. It is necessary to outline the general approach to post-adoption contact previously taken by the courts before returning to *Re P* itself.

At one time, post-adoption contact would have been considered a contradiction in terms.<sup>58</sup> The prevailing view, as JC Hall expressed it, was that ‘continued access by a natural parent is repugnant to the purpose of adoption, which is to effect the complete legal transplant of the child from one

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<sup>51</sup> Adoption and Children Act 2002, s 26(5).

<sup>52</sup> Adoption and Children Act 2002, s 46(6). Similar obligations are imposed when the court is making a placement order: s 27(4)(a).

<sup>53</sup> *Re J* [2010] EWCA Civ 581, at [5]. Cf S Harris-Short, ‘Making and Breaking Family Life: Adoption, the State, and Human Rights’ (2008) 35 *Journal of Law and Society* 28, at p 42.

<sup>54</sup> *Ibid*, at [33].

<sup>55</sup> Cf Adoption Act 1976, s 6.

<sup>56</sup> [2008] EWCA Civ 535, [2008] 2 FLR 625.

<sup>57</sup> *Re J* [2010] EWCA Civ 581, at [25].

<sup>58</sup> See, eg, *Re V (A Minor) (Adoption: Consent)* [1987] Fam 57.

family to another'.<sup>59</sup> Attitudes to post-adoption contact among many social scientists and social work practitioners have changed significantly since the 1970s,<sup>60</sup> and its potential benefits are now recognised.<sup>61</sup> There has been something of a related move towards 'open adoption', involving the freer exchange of information between the parties to an adoption as an alternative to the secrecy that traditionally characterised the process.<sup>62</sup> Even so, the courts remained reluctant to make an order requiring post-adoption contact to take place. This approach, in the view of Sonia Harris-Short and Joanna Miles, 'contrasts sharply' with the positive attitudes towards post-adoption taken by social workers.<sup>63</sup> The reluctance to formalise contact prevailed even where the adoptive parents supported contact between the adopted child and his or her natural parent, since the courts did not wish to impose an order that was unnecessary.<sup>64</sup>

In the post-2002 Act case of *Re P*, however, the Court of Appeal concluded that it was:

...not...a proper exercise of the judicial powers given to the court under the 2002 Act to leave contact between the [relevant] children themselves, or between the children and their natural parents, to the discretion of the local authority and/or the prospective carers of [the two siblings who were the subjects of the proceedings], be they adoptive parents or foster carers.<sup>65</sup>

Taken at face value, this could imply that the courts would be much more interventionist in contact decisions related to adoption than they had previously been. But *Re P* was a very different case from *Re J* in many respects. No adoption order had yet been made, and the local authority was applying for care and placement orders in the face of opposition to placement for adoption from both the mother and the children's guardian. This meant that the court was largely concerned with its jurisdiction to order contact under the 2002 Act rather than the 1989 Act. Even then, most of the judgment is concerned with the proper test for dispensing with the need for parental consent to a placement order and the propriety of 'dual planning' involving both care and adoption. The contact

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<sup>59</sup> JC Hall, 'Problems of adoption and custodianship' [1987] CLJ 40, at p 42.

<sup>60</sup> B Lindley, 'Open Adoption – Is The Door Ajar?' [1997] CFLQ 115, at pp 117-118.

<sup>61</sup> But see C Smith and J Logan, 'Adoptive parenthood as a "legal fiction" – its consequences for direct post-adoption contact' [2002] CFLQ 281 for an account of the differing views on this issue.

<sup>62</sup> See, eg, K O'Halloran, *The Politics of Adoption: International Perspectives on Law, Policy & Practice* (Springer, 2<sup>nd</sup> edn, 2009), at pp 43-44.

<sup>63</sup> S Harris-Short and J Miles, *Family Law: Text, Cases and Materials* (OUP, 2<sup>nd</sup> edn, 2011), at p 951.

<sup>64</sup> *Re T (Adoption: Contact)* [1995] 2 FLR 251.

<sup>65</sup> [2008] EWCA Civ 535, at [153] per Wall LJ, giving the judgment of the court.

issue was ‘not determinative of the appeal’ in *Re P*,<sup>66</sup> and thus the judges were anxious to approach the matter ‘with caution’.<sup>67</sup> In *Re J*,<sup>68</sup> Lord Neuberger denied the relevance of Wall LJ’s remark in *Re P* that ‘it is the court which has the responsibility to make orders for contact if they are required in the interests of the [relevant] children’,<sup>69</sup> probably because Wall LJ was referring specifically to the court’s role when it comes either to make adoption orders or to revoke placement orders. Moreover, the most significant future concern in *Re P* appeared to be the likely importance of contact between the two siblings rather than between each sibling and the natural mother.<sup>70</sup> These factors both illustrate and add to the crucial difference between *Re P* and *Re J*. One case was concerned to a limited extent with pre-adoption contact, and the other’s central concern was post-adoption contact.

But the matter does not end there. In *Re P*, Wall LJ conducted a careful review of the authorities on adoption and contact. His review culminated in a citation of his own remarks in *Re R (Adoption: Contact)*,<sup>71</sup> which were subsequently to become extremely influential in *Re J*. In *Re R*, the half-sister of a child who had been adopted failed to secure leave to apply for a contact order with that child. The adoptive parents were willing to facilitate contact, but there was disagreement about its appropriate nature and extent and they opposed the formal application. Giving the judgment of the Court of Appeal in *Re R*, Wall LJ held that:

...[post-adoption] contact is more common, but nonetheless the jurisprudence...is clear. The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual.<sup>72</sup>

In *Re P*, however, Wall LJ opined that ‘[a]ll this...now falls to be revisited’ in the light of the contact provisions and the extended meaning of welfare contained in the 2002 Act.<sup>73</sup> Indeed, *Re R* was decided before the commencement of the new Act.<sup>74</sup> While Wall LJ did not imply that the Act

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<sup>66</sup> Ibid, at [54].

<sup>67</sup> Ibid, at [141].

<sup>68</sup> [2010] EWCA Civ 581, at [25].

<sup>69</sup> [2008] EWCA Civ 535, at [151].

<sup>70</sup> See, eg, ibid, at [151]. In terms of what had already occurred, however, the court found it ‘deeply worrying that the local authority was able to terminate contact between [one of the children] and her mother without the authority of, or even reference to, the court’ (at [54]).

<sup>71</sup> [2005] EWCA Civ 1128, [2006] 1 FLR 373.

<sup>72</sup> Ibid, at [49].

<sup>73</sup> [2008] EWCA Civ 535, at [147].

<sup>74</sup> [2005] EWCA Civ 1128, at [48].

would have a very significant impact on the relevant jurisprudence at the time of his decision in *Re R*,<sup>75</sup> he did not consider the matter in any great depth and he appears to have come to a different conclusion when he reconsidered it in *Re P*.

In *Re P*, Thorpe and Wall LJ and Munby J admitted that they did not know whether their ‘views on contact on the facts of this particular case presage a more general sea change in post-adoption contact overall’.<sup>76</sup> But they did say that ‘the 2002 Act envisages the court exercising its powers to make contact orders post adoption, where such orders are in the interests of the child concerned’.<sup>77</sup>

Thus even though the jurisdiction to make a contact order is to be found under the 1989 Act when the adoption order stage is reached,<sup>78</sup> *Re P* can be read as suggesting that the 2002 Act has (or should have) an impact on the making of section 8 contact orders, especially when combined with the obligation imposed by section 46 to consider contact when making an adoption order. This is in spite of Lord Neuberger’s conclusion to the contrary in *Re J*,<sup>79</sup> and the Court of Appeal’s subsequent application in *Re T (A Child) (Adoption: Contact)*<sup>80</sup> of *Re R* in the light of *Re J*.

Contact at the placement stage is obviously distinct from post-adoption contact and has much in common with contact while a child is in care. Moreover, the views of commentators on the potential impact of the 2002 Act were mixed. Harris-Short and Miles think that the Act ‘arguably marks a shift away from [the] very cautious approach towards post-adoption contact, potentially making the use of s[ection] 8 orders in the context of adoption much more routine’.<sup>81</sup> Andrew Bainham appeared more sceptical, arguing that the Act neither encourages post-adoption contact nor implies that ‘all other things being equal, continuing contact with birth relatives is a good thing which is receiving official approval’.<sup>82</sup>

We take the view that the Court of Appeal in *Re J* may have been too quick to dismiss the relevance of both the reasoning in *Re P* and the 2002 Act to contact decisions where an adoption order has already been made. Lord Neuberger’s focus on the *Re R dictum* and his fixation with the fact that

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<sup>75</sup> Ibid, at [49].

<sup>76</sup> [2008] EWCA Civ 535, at [154].

<sup>77</sup> Ibid.

<sup>78</sup> This was accepted in *Re P*: *ibid*.

<sup>79</sup> [2010] EWCA Civ 581, at [9].

<sup>80</sup> [2010] EWCA Civ 1527, [2011] 1 FLR 1805, at [22] per Wilson LJ. Sir Nicholas Wall was on the panel in *Re T* but did not specifically cite *Re R*, *Re P*, or *Re J* in his extremely short judgment.

<sup>81</sup> Harris-Short and Miles, *Family Law: Text, Cases and Materials*, at p 955.

<sup>82</sup> A Bainham, *Children: The Modern Law* (Family Law, 3<sup>rd</sup> edn, 2005), at p 300.

Judge Corrie did not cite it, in turn, may have resulted in a failure adequately to consider all of the aspects of J's welfare. It is arguable that the child had an interest in the natural parents retaining or viewing a photograph of her. This interest should have been considered in more detail as part of the analysis of the child's welfare. This is true irrespective of which version of the paramountcy principle was most applicable, since even the 1989 formulation is notably broad in scope. It may also raise issues under Article 8, and we will return to the detail of the Article 8 arguments below. However, they immediately raise the broader issue of whether the courts should defer so readily to the wishes of the adoptive parents when making a decision in respect of which J's welfare was the paramount consideration. It is to this issue which we now turn.

#### The wishes of the adoptive parents and the paramountcy of welfare

In *Re J*, the adopters wished to have their status as J's parents recognised as 'inviolable',<sup>83</sup> a stance with which the Court of Appeal clearly sympathised. Of course, it is extremely important for adoption to be final and secure, and indeed adoption orders can be set aside only in 'highly exceptional and very particular circumstances'.<sup>84</sup> Once the adoption decision was validly made, the adoptive parents clearly had an immeasurably greater claim to take decisions about the upbringing of J than did her natural parents. As Lord Neuberger pointed out, while the term 'adoptive parents' is a useful pragmatic description in a case also involving the natural parents, as a matter of law they were J's parents by the time the case was heard by Judge Corrie.<sup>85</sup> The natural parents were no longer legal parents, and they would have had to seek the leave of the court before they could even apply for contact.<sup>86</sup> The adoptive parents and J also had an Article 8 right to respect for their family life,<sup>87</sup> which the Court of Appeal was obliged to protect but did not consider.

That said, great care must be taken to avoid identifying the wishes and desires of parents as synonymous with the welfare of a child. The adoptive parents denied that they wanted recognition of their status 'for themselves' and claimed that they sought merely 'to give J the very best chance for the adoption to be successful'.<sup>88</sup> Nevertheless, it is now judicially recognised that (aside from the impact of Article 8) parental rights exist only for the purposes of discharging parental

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<sup>83</sup> [2010] EWCA Civ 581, at [11].

<sup>84</sup> *Webster v Norfolk County Council* [2009] EWCA Civ 59, [2009] 1 FLR 1378, at [149] per Wall LJ.

<sup>85</sup> [2010] EWCA Civ 581, at [4].

<sup>86</sup> Children Act 1989, s 10. See *Re B (Child)* [2011] EWCA Civ 509, [2011] Fam Law 677.

<sup>87</sup> *Pini v Romania* [2005] 2 FLR 596.

<sup>88</sup> [2010] EWCA Civ 581, at [36].

responsibilities,<sup>89</sup> and that parents are not free to ‘make martyrs of their children’.<sup>90</sup> Parental status as regards decision-making is ultimately subject to the jurisdiction of the courts, and in this sense it is never ‘inviolable’. Indeed, contact orders are regularly made against the wishes of a legal parent. A contact dispute between two legal parents, both of whom may have parental responsibility, is not analogous to one between new legal parents and applicants with no subsisting legal status in respect of the relevant child. But in both situations, as a matter of current domestic law, the best interests of the child constitute the paramount consideration. The implication of that fact is that if the court had decided that J had no interest in the retention of the photographs, the proper conclusion would not have been materially affected by the views of even the adoptive parents.

The potential pitfall of prioritising parental desires over child welfare does not of itself mean that the Court of Appeal reached the wrong conclusion in *Re J*. Indeed, of the adults involved in the case, it could be argued that the position of the adoptive parents was most closely aligned with the best interests of J. Moreover, whether or not the court gave too much weight to the interests of one set of adults, in the context of the paramountcy principle it would be fruitless to argue that it therefore should have given more weight to the interests of another set of adults (the natural parents).

The Court of Appeal specifically framed its unwillingness to impose the contact order sought against the wishes of J’s new parents as a means of protecting her welfare.<sup>91</sup> Moreover, Lord Neuberger acknowledged that ‘as a matter of law the adoptive parents’ wishes cannot be determinative or dispositive’.<sup>92</sup> Of course, the security of an adoption placement is an extremely important aspect of welfare. The very aim of many modern adoptions is to find permanent homes for children who might otherwise drift through state care.<sup>93</sup> Thus it may well be the case that any interest of J’s in her natural parents retaining photographs of her paled into insignificance as compared to her interest in being cared for by parents freed from concern about possible interference by her natural parents. Indeed, the Court of Appeal suggested that the judge had ‘overestimated’ the value of the contact,<sup>94</sup> which was described as ‘query debatable’ by Wilson LJ

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<sup>89</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 184. Cf *R (Williamson) v Secretary of State for Education & Employment* [2005] UKHL 15, [2005] 2 AC 246, at [72] per Baroness Hale.

<sup>90</sup> *Prince v Massachusetts* (1944) 321 US 158, at 170 per Rutledge J, cited in *Re S; Newcastle City Council v Z* [2005] EWHC 1490 (Fam), [2007] 1 FLR 861, at [54] per Munby J.

<sup>91</sup> See, eg, [2010] EWCA Civ 581, at [6].

<sup>92</sup> *Ibid*, at [26].

<sup>93</sup> Secretary of State for Health, *Adoption: A New Approach*, Cm 5017 (2000).

<sup>94</sup> [2010] EWCA Civ 581, at [34].

when giving permission to appeal.<sup>95</sup> Some scepticism about the value of the particular type of contact sought by the natural parents was entirely well-placed, due to J's inevitably limited memory of her parents.<sup>96</sup> In any case, the Court of Appeal did record the local authority's agreement to facilitate annual letterbox contact, which was to include the production of a photograph for viewing (but not retention) by the natural parents, in its order.<sup>97</sup> From an objective perspective permission to retain the photograph would arguably have added little to the value of that contact. Any extra value that it did have was ostensibly aimed at the natural parents rather than J since any information provided would have been flowing in one direction only.

The Court of Appeal was also correct to say that there was 'no dichotomy' between the adoptive parents' fears that the photographs might be used to trace J and J's own welfare, since the two interests clearly overlap.<sup>98</sup> But the overlap of interests is by no means absolute, and the contention that the fears 'compelled the conclusion that the natural parents should not be given the photographs'<sup>99</sup> unless they had 'no basis'<sup>100</sup> risks the illegitimate conflation of interests. This is true even if the Court of Appeal's approach is justifiable under the current law on the basis that a resident parent's fears can prevent direct contact even with another legal parent if they are 'genuine and rationally held',<sup>101</sup> and sometimes if they are not.<sup>102</sup>

Moreover, writing before the decision in *Re P* and *Re J*, Harris-Short and Miles were far from convinced that the courts take a consistent approach in contact disputes involving adoptive parents and those involving other legal parents. They went as far as to claim that '[i]t is almost as if the courts cannot perceive of the adoptive parents acting against the child's best interests'.<sup>103</sup> That allegation could certainly be made against the Court of Appeal in *Re J*, although Harris-Short and Miles focused their arguments on cases where 'there is no risk of the placement breaking down or

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<sup>95</sup> Ibid, at [19].

<sup>96</sup> It is arguable that J was closer to the paradigm of a 'trouble-free bab[y]' (Performance and Innovation Unit, *Prime Minister's Review of Adoption* (2000), at p 14) that once featured much more prominently in the adoption context than the modern paradigm of an older, troubled child with a subsisting memory of her parents, although the very fact that the parents wished to retain contact with her is consistent with contemporary attitudes to 'open adoption'.

<sup>97</sup> [2010] EWCA Civ 581, at [38].

<sup>98</sup> Ibid, at [29].

<sup>99</sup> Ibid.

<sup>100</sup> Ibid, at [31].

<sup>101</sup> See, eg, *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48, at p 53 per Hale J.

<sup>102</sup> *Re H (children) (contact order) (No 2)* [2002] 1 FLR 22.

<sup>103</sup> S. Harris-Short and J. Miles, *Family Law: Text, Cases and Materials* (OUP, 1<sup>st</sup> edn, 2007), at p 1047.



the welfare balance nevertheless comes down in favour of continuing contact'.<sup>104</sup> Writing elsewhere, Harris-Short acknowledges that '[c]learly, if the adoption placement is at risk of breaking down, the adoptive parents' Article 8 rights, as well as the child's rights and interests, may well demand that there is no further contact with the birth family'.<sup>105</sup> It is not clear that *Re J* was a case where a real risk of breakdown existed, and the Court of Appeal could well have allowed the internet-related aspect of the adoptive parents' objection to assume undue significance. In any event, the court should have taken more care to avoid implying that the adoptive parents would inevitably act in J's best interests.

The allegation that the courts stretch the welfare principle to mask considerations of adult interest is not new.<sup>106</sup> Such ingenuity is perhaps inevitable in a domestic legal framework where children's interests have effectively been declared as the sole consideration.<sup>107</sup> The theoretically absolute priority given to children's interests on the one hand and the pragmatic but implicit consideration of adult interests on the other suggest that a system where all competing interests can be weighed up would be preferable. Article 8 provides the opportunity for such a system to be implemented by the judiciary, but they have rarely availed of it when applying the paramountcy principle.<sup>108</sup>

As illustrated by *Re J*, the current reasoning process can omit proper consideration of some of the child's own interests, in this case her interest in maintaining contact with her birth family through her natural parents' retention of the photographs. While this interest would inevitably have been a minor one in the context of the welfare principle, the Court of Appeal did not sufficiently separate that principle from the wishes of the adoptive parents. Their judgment also failed to give adequate weight to the Article 8 rights potentially possessed either by J or by her natural parents, which could have overlapped with some aspects of J's welfare. These issues are considered in the following sections.

Article 8 rights to respect for family life of a natural parent and an adopted child *vis-à-vis* each other

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<sup>104</sup> Ibid.

<sup>105</sup> Harris-Short, 'Making and Breaking Family Life', at p 42.

<sup>106</sup> See, eg, H Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267. See, in particular, *Payne v Payne* [2001] EWCA Civ 166, [2001] Fam 473; *Re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 WLR 242.

<sup>107</sup> *J v C* [1970] AC 668. See, recently, *Re B (A Child) (Residence: Biological Parent)* [2009] UKSC 5, [2009] 1 WLR 2496, at [37] per Lord Kerr, giving the judgment of the court.

<sup>108</sup> See, eg, D Bonner, H Fenwick and S Harris-Short, 'Judicial Approaches to the HRA' (2003) 52 *International & Comparative Law Quarterly* 549.



In *Re J* the Court of Appeal gave no consideration to the question whether J had an Article 8 right to respect for family life *vis-à-vis* her natural parents. A slightly different question is whether natural parents retain any rights to respect for family life in relation to the child post-adoption. This latter issue was raised by the applicants in *Re J* and not fully considered by the Court of Appeal, although Lord Neuberger did regard it as ‘very far from obvious’ that the natural parents’ rights to respect for family life with J could survive the adoption.<sup>109</sup> We will consider both of these issues in this section. However, the jurisprudence on these issues is sparse. Moreover, any such rights possessed by the child and the natural parents are inherently linked. A mismatch may nevertheless be conceivable in situations where a parent no longer wishes to have contact with the child, but the child arguably retains an interest in maintaining some form of connection with the parent, although as we will see these situations are usually analysed under the right to respect for private life rather than the family life provision.<sup>110</sup>

Adoption terminates the legal relationship between the child to be adopted and his or her natural parents.<sup>111</sup> It has been described as the ‘most draconian interference with family life possible’.<sup>112</sup> This makes an adoption order a clear *prima facie* infringement of the child’s and the natural parents’ Article 8 rights to respect for family life, albeit one that can be justified under Article 8(2). Baroness Hale and Jane Fortin suggest that ‘[t]he ability of birth parents to retain some contact with their child may...help to make compulsory adoption more Convention compliant’,<sup>113</sup> but there is little Strasbourg jurisprudence on post-adoption contact.<sup>114</sup> In *R and H v United Kingdom*,<sup>115</sup>

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<sup>109</sup> [2010] EWCA Civ 581, at [43].

<sup>110</sup> See *Odièvre v France* (2004) 38 EHRR 4, discussed below.

<sup>111</sup> Adoption and Children Act 2002, s 67. Cf ‘simple adoption’, a form of adoption available in France and some other civil jurisdictions, which ‘does not sever the relationship with the family of origin so that the adopted child is not entirely integrated into his or her adoptive family’: Explanatory Report to the European Convention on the Adoption of Children (Revised) 2008, at [63].

<sup>112</sup> *Down Lisburn Health & Social Services Trust v H* [2006] UKHL 36, [2007] 1 FLR 121, at [34] per Baroness Hale.

<sup>113</sup> B Hale and J Fortin, ‘Legal Issues in the Care and Treatment of Children with Mental Health Problems’ in Rutter *et al* (eds), *Rutter’s Child and Adolescent Psychiatry* (Blackwell, 5<sup>th</sup> edn, 2008) at p 102.

<sup>114</sup> The issue was raised in the Commission decision of *Clark v United Kingdom* (Application no 23387/94) (available on HUDOC) 5 December 1995, where a natural father argued that a local authority had failed to respect his right to respect for family life *inter alia* by placing his children with prospective adopters who were opposed to contact without consulting him. This case was settled at an early stage; therefore, the Strasbourg institutions offered no guidance on the scope and application of Article 8 on contact post-adoption. See also *GHB v United Kingdom* (Application no 42455/98) (available on HUDOC) 4 May 2000, a case in which grandparents sought to argue that an adoption order

decided after *Re J*, the natural parents complained that the Northern Ireland High Court violated their right to respect for family life under Article 8 by freeing the child for adoption without parental consent.<sup>116</sup> The parents had unsuccessfully argued, *inter alia*, that their refusal to consent was reasonable because it was unclear whether adopters who were open to post-adoption contact could be found. The judge's decision was upheld by the Court of Appeal<sup>117</sup> and the House of Lords, with Baroness Hale dissenting.<sup>118</sup> The claim before the European Court failed, but some its analysis (whilst limited) suggests that Article 8 is generally applicable to the issue of post-adoption contact. For example, the Court was persuaded by the argument that the Health and Social Services Trust responsible for the adoption should have been given six months to find adopters willing to consent to post-adoption contact before a freeing order was issued.<sup>119</sup> Ultimately, however, the European Court was satisfied that the directions made by the Court of Appeal placed sufficient emphasis on post-adoption contact. It therefore rejected the suggestion that 'the domestic courts allowed [the child] to be freed for adoption without proper regard for the fact that her interests, and those of the applicants, were best served by post-adoption contact.'<sup>120</sup> Whilst the Court did not expressly state that Article 8 encompasses post-adoption contact, and whilst *R and H* raised the broader issue of approving adoption without the consent of the natural parents, the significance that the Court implicitly attached to post-adoption contact suggests that Article 8 is relevant to this issue.

There are many Strasbourg decisions on whether an adoption decision itself was compatible with Article 8.<sup>121</sup> Although the European Court's attitude to adoption has been described as 'rather ambiguous',<sup>122</sup> it has emphasised that adoption without parental consent will be justified only in exceptional circumstances.<sup>123</sup> Similarly, where a child is taken into state care (but not adopted), the Strasbourg Court has emphasised that 'a measure as radical as the total severance of contact' with a

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should not have been made despite the fact that the 12-year-old child wanted to be adopted and to sever contact with her natural family. This complaint was declared inadmissible by the Court.

<sup>115</sup> (Application no 35348/06) (available on HUDOC) 31 May 2011.

<sup>116</sup> *Re N* [2005] NIFam 5. For a summary of the relevant Northern Irish Law and a brief comparison with the English Adoption and Children Act 2002, see *R and H v United Kingdom* (Application no 35348/06), at [43]-[49].

<sup>117</sup> *Down Lisburn Health and Social Services Trust v H and Another* [2005] NICA 47(1).

<sup>118</sup> [2006] UKHL 36, [2007] 1 FLR 121.

<sup>119</sup> (Application no 35348/06), at [87].

<sup>120</sup> *Ibid.*

<sup>121</sup> See, eg, *Eski v Austria* [2007] 1 FLR 1650; *Söderbäck v Sweden* (2000) 29 EHRR 95; *Keegan v Ireland* [1994] 3 FCR 165; *Kearns v France* [2008] 1 FLR 888.

<sup>122</sup> J Herring, *Family Law*, (Pearson, 5<sup>th</sup> edn, 2011), at p 680.

<sup>123</sup> *Eski v Austria* [2007] 1 FLR 1650.

parent can also be justified ‘only in exceptional circumstances’,<sup>124</sup> and that ‘any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child’.<sup>125</sup>

The position is much less clear, however, where (as in *Re J* but unlike the situation in *R and H v UK*) adoption occurs with consent but a natural parent still seeks contact. Shazia Choudhry and Jonathan Herring express the view that Article 8 requires a refusal to grant post-adoption contact to be justified.<sup>126</sup> Bainham similarly contemplates the possibility of Article 8-based challenges by natural parents to post-adoption contact decisions,<sup>127</sup> but elsewhere he implies that ‘existing kinship links and contacts’ can truly be preserved only by avoiding full adoption altogether.<sup>128</sup> Harris-Short argues that it is more difficult to bring post-adoption contact within the realm of ‘family life’ rather than ‘private life’.<sup>129</sup> Once the adoption order has been made, the termination of the legal relationship may therefore prevent a realistic argument that there is any subsisting family life worth protecting under Article 8. We will return to the relevance of the right to private life in this context shortly. First we will consider the argument of one scholar who has dealt expressly with the question of family life in this context.

Ursula Kilkelly has suggested that the Commission left open the question whether a right to respect for family life endures post-adoption in *X v UK*.<sup>130</sup> She states that:

Where family life exists under Article 8 § 1 it is unclear whether voluntary adoption will interrupt these ties or even cause them to cease altogether....[W]here a mother initially consented to her child’s adoption, and then later underwent a change of heart and sought the child’s return, the Commission accepted that the tie of family life had been re-established between them. It is likely, therefore, that the relationship between a mother and her child will fall outside the scope of Article 8 in exceptional

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<sup>124</sup> *S and G v Italy* [2000] 2 FLR 771, at [170].

<sup>125</sup> *K and T v Finland* [2001] 2 FLR 707, at [178].

<sup>126</sup> S Choudhry and J Herring, *European Human Rights and Family Law* (Hart, 2010), at p 334.

<sup>127</sup> Bainham, *Children: The Modern Law* at pp 300-301.

<sup>128</sup> A Bainham, ‘Arguments about Parentage’ [2008] CLJ 322, at pp 349-351. Cf Smith and Logan, ‘Adoptive parenthood as a “legal fiction” – its consequences for direct post-adoption contact’ for an argument that a ‘transplant’ model of adoption actually facilitates post-adoption contact by conferring the status of parenthood and making adoptive parents feel confident enough to allow such contact.

<sup>129</sup> Harris-Short, ‘Making and Breaking Family Life’, at p 40.

<sup>130</sup> (1977) DR 11, p 160 (available on HUDOC).

circumstances only.<sup>131</sup>

However, *X v UK* was a rather different case to *Re J*. It was not directly concerned with the relevance of Article 8 post-adoption, but with the different question of whether adoption should be imposed contrary to a natural mother's wishes. This important distinction was expressly noted by the Court of Appeal in *Re J*.<sup>132</sup> As noted above, the Strasbourg Court has made it clear that such measures are a clear violation of the natural mother's right to respect for family life, although such measures can of course be justified under Article 8(2). X (aged 18) had originally stated that she wanted her child to be adopted, but post-birth complications made it clear within months that X would be unable to have children in the future. At this point X decided that she wanted the child back. The adoption had yet to be formalised and the adoptive parents sought an adoption order. X contested the adoption but the court ordered adoption without her consent. Thus the question for the Commission, in common with much of the Strasbourg jurisprudence, was whether the court violated X's Article 8 right to respect for family life by ordering the adoption.

The Commission was clearly of the view that Article 8 was engaged. Indeed it held that the interference was justified under Article 8(2) and that the case was manifestly ill-founded under Article 27(2) ECHR. However, whilst Kilkelly suggests that the Commission did accept 'that the tie of family life had been re-established between [X and the child]', we take the different view that the tie of family life had not been broken because the adoption had not been formalised. At the very least, a crucial feature of the case appears to have been the mother's desire to take the child back and her eventual opposition to the adoption. If the fact that the adoption had not yet taken place and the mother's change of heart were decisive aspects, whatever the implications of Kilkelly's analysis, *X v UK* does not support the proposition that there is a right to respect for family life where the natural parents consent to the adoption but nevertheless seek post-adoption contact. Indeed the manner in which the Commission posed the question for consideration (which related to whether the adoption order should have been made) suggests that family life terminates upon adoption. It phrased the question as follows:

After living for two years in its adopted family was the child's interest in being adopted both from the point of view of breaking its links with its mother and that of consolidating its links with the adopters already so clear that the adoption should be ordered against the mother's will *thus destroying all possibility of family life between*

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<sup>131</sup> U Kilkelly, *The Child and the European Convention on Human Rights* (Ashgate, 1999), at p 301.

<sup>132</sup> [2010] EWCA Civ 581, at [42].

*her and the child?* [emphasis added]<sup>133</sup>

Since the Commission believed that adoption itself would destroy ‘all possibility of family life’ we are not so optimistic that this decision demonstrates that ‘the relationship between a mother and her child will fall outside the scope of Article 8 in exceptional circumstances only’.<sup>134</sup> However, whilst we do not derive support from *X v UK*, we are also conscious that this was an admissibility decision of the Commission from 1977.<sup>135</sup> The Commission’s strong statement that the possibility of family life is destroyed following adoption is not necessarily authoritative today – particularly in the light of the shift in adoption policy and practice. Indeed, as Harris-Short points out, the European Court’s approach to ‘family life’ can be more flexible than domestic law allows given its emphasis on *de facto* ties,<sup>136</sup> and she argues that ‘[t]he fact that the formal legal relationship between the birth parents has been...terminated should not therefore prove decisive’.<sup>137</sup>

In the light of its strong opposition to severing a child from its roots other than in the most exceptional circumstances,<sup>138</sup> it would also be undesirable on policy grounds for the European Court retrospectively to increase the magnitude of interference with an Article 8 right caused by an adoption by holding that it eliminated ‘family life’ that had previously existed. Paradoxically, however, the court’s own emphasis on the draconian and exceptional nature of adoption as regards family life may well have made it more difficult to sustain an argument that family life subsists after adoption occurs.

One case in which an adopted person sought to invoke a right to respect for family life post-adoption was *Odièvre v France*.<sup>139</sup> The applicant challenged the French system of anonymous births which prevented her from accessing information about her natural mother. She argued that ‘her request for information about strictly personal aspects of her history and childhood came within the scope of Article 8 of the Convention’ and that ‘[e]stablishing her basic identity was an integral part not only of her “private life”, but also of her “family life” with her natural family, with whom she

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<sup>133</sup> (1977) DR 11, p 160, at [2].

<sup>134</sup> See text to n 131 above.

<sup>135</sup> The European Court recently considered the issue of withdrawing consent to adoption in *Kearns v France* [2008] 1 FLR 888.

<sup>136</sup> See, eg, *X v Switzerland* (1978) DR 13, p 248, where ‘family life’ was said to exist between foster-parents and their foster-child. The European Court can also be *less* flexible than domestic law approaches to parental relationships, since not every legal father has ‘family life’ with his child: *B v United Kingdom* [2000] 1 FLR 1

<sup>137</sup> Harris-Short, ‘Making and Breaking Family Life’, at p 40.

<sup>138</sup> *Görgülü v Germany* [2004] 1 FLR 894, at para [48].

<sup>139</sup> (2004) 38 EHRR 4.

hoped to establish emotional ties...'.<sup>140</sup> This was contested by the French Government, which argued that 'the guarantee of the right to respect for family life under Article 8 presupposed the existence of a family', and that the case law required there 'to be at the very least close personal ties'.<sup>141</sup> Applying this to the facts of *Odièvre*, the Government argued that 'no family life within the meaning of Article 8...existed between the applicant and her natural mother', on the basis that, 'the applicant had never met her mother, while the latter had at no point expressed any interest in the applicant or regarded her as her child'.<sup>142</sup>

Even if these submissions were correct, it should be noted that the facts of *Re J* are clearly different from *Odièvre* in some respects. The child in *Re J* had met her parents, albeit that she had been adopted at an extremely young age and the *de facto* ties between the parties were therefore arguably limited. Unlike in *Odièvre*, the natural parents clearly had expressed an interest in J by seeking ongoing contact with her, although they too had consented to the adoption.

In any case, the European Court of Human Rights offered no insight into the question whether the applicant in *Odièvre* could have a right to respect for family life in relation to her natural parents. It skirted the issue and held that as 'the applicant's purpose [was] not to call into question her relationship with her adoptive parents but to discover the circumstances in which she was born and abandoned, including the identity of her natural parents and brother' the court should consider the case 'from the perspective of private life, not family life, since the applicant's claim... is based on her inability to gain access to information about her origins'.<sup>143</sup> It found that the private life provision was applicable although it afforded a wide margin of appreciation to the state and found that the right had not been violated in this case. This analysis fits with Harris-Short's contention that it is easier to fit post-adoption contact within 'private life' as compared to 'family life', although clearly the application in *Re J* involved natural parents seeking a form of contact with a child rather than information about a child's biological origins being sought for the benefit of that child. This in turn raises the question whether any rights of the natural parents may form part of the right to respect for private life rather than the right to respect for family life. We return to the implications of the right to respect for private life for both the natural parents and the child in the following section.

Even if some of the interests at stake in *Re J* could fall under the right to respect for private life,

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<sup>140</sup> Ibid, at [25].

<sup>141</sup> Ibid, at [26].

<sup>142</sup> Ibid.

<sup>143</sup> Ibid, at [28].

there is room for development of the right to respect for family life in post-adoption cases, especially given the shifts in adoption practice and the Court's willingness to expand the scope of Article 8 in other areas.<sup>144</sup> However, in the light of the current uncertainty in the Strasbourg jurisprudence, it is not suggested that the Court of Appeal in *Re J* would have reached a different conclusion had it devoted more time to the question whether 'family life' still existed between J and her natural parents. English courts are not renowned for genuine consideration of Article 8 even in non-adoption contact decisions, where the existence of 'family life' is usually much more clear-cut.<sup>145</sup> Lord Neuberger would probably have proceeded almost directly from any finding that the natural parents (or indeed the child)<sup>146</sup> had a subsisting right to respect to family life to a conclusion that the interference with those rights could be justified under Article 8(2) on the basis of J's welfare. Indeed, he effectively admitted as much by saying that any rights of the parents would not have 'sufficed to tip the balance in their favour'.<sup>147</sup> But it is arguable that the Court of Appeal should have taken its obligations more seriously by hearing argument on the Article 8 point and considering the matter in greater depth.

#### The right to respect for private life

In addition to the right to respect for family life we need to consider the right to respect for private life of J and the natural parents.<sup>148</sup> There are a number of facets to this right. Moreover, interests protected under the child's own private life right may point in opposite directions.

#### The natural parents

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<sup>144</sup> The Court has asserted that the Convention is a 'living instrument'. This has left the Court in a position to expand the right in accordance with the demands of social change and to accommodate issues such as transsexual identity rights (see *Goodwin v United Kingdom* (2002) 35 EHRR 18) within the scope of private life. For discussion of the creativity of the Court and the development of the 'living instrument' approach see A Mowbray, 'The Creativity of the European Court of Human Rights' (2005) 5 *Human Rights Law Review* 57.

<sup>145</sup> *Re H (children) (contact order) (No 2)* [2002] 1 FLR 22.

<sup>146</sup> A child's rights can have an uneasy relationship with that child's own welfare: see, eg, Harris-Short and Miles, *Family Law: Text, Cases and Materials* (2<sup>nd</sup> edn, OUP, 2011), at p 556.

<sup>147</sup> [2010] EWCA Civ 581, at [43].

<sup>148</sup> There may also be an argument that the adoptive parents have a right to respect for private life which is engaged on these facts. This argument would mirror the argument that the natural parents have a right to establish and develop relations with J. However, in the case of the adoptive parents this interest would clearly be protected by the right to respect for family life and therefore there would be no need for them to resort to the private life provision. None of these rights were considered in *Re J*.



It is highly speculative whether the court would find that natural parents have a right to know information regarding their offspring under the right to respect for private life. In a sense this would be the mirror image of the child's right to know of his or her origins (considered below). The right to respect for private life is broader than that to respect for family life and the courts have often dealt with cases relating to family issues under the private life provision where family life has not been established. For example, cases concerning paternity, identity and non-discrimination have been dealt with under the private life provision.<sup>149</sup> However, these are rather different contexts from post-adoption contact and it is therefore unclear that the European Court would take this approach here. One facet of the right which could be relevant is 'the right to establish and develop relations with others' which, as noted below, one scholar has argued could be used to build on the adopted child's right to know of his or her origins to form an argument for post-adoption contact. Whether the court would take the same approach to the rights of natural parents is questionable. Moreover, if it were to do so any rights would clearly have to be balanced against the rights of the child.

The child's right to know of her biological origins and the right to establish and develop relations with others

As noted above, in *Odièvre* the Strasbourg Court held that a child has a right to know of his or her origins, subject to the margin of appreciation, as part of his or her right to respect for private life. The court has recognised this as a significant aspect of the right to respect for private life outside the adoption context,<sup>150</sup> and it is also protected by Articles 7 and 8 of the United Nations Convention on the Rights of the Child. Moreover, Article 22 of the Revised European Convention on the Adoption of Children provides *inter alia* that an adopted child 'shall have access to information' held by an adoption agency 'concerning his or her origins'.<sup>151</sup> Knowledge of origins is a key feature of the domestic move towards 'open adoption', and the 2002 Act contains a framework regulating the disclosure of information by adoption agencies.<sup>152</sup> In addition to the right to know of one's origins, the Strasbourg Court has also held that the right to respect for private life includes the 'right to

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<sup>149</sup> See, eg, *Rasmussen v Denmark* (1985) 7 EHRR 37; *Backlund v Finland* (Application no 36498/05) (available on HUDOC) 6 July 2010; *Anayo v Germany* [2011] 1 FLR 1883, discussed in B Sloan, 'Unmarried Fathers and the Frustration of Family Life' [2011] CLJ 314.

<sup>150</sup> See, eg, *Shofman v Russia* [2006] 1 FLR 680; *Mizzi v Malta* [2006] 1 FLR 1048; *Róžański v Poland* [2006] 2 FLR 1163. These cases are discussed in A Bainham, "'Truth Will Out': Paternity in Europe' [2007] CLJ 278.

<sup>151</sup> European Convention on the Adoption of Children (Revised) 2008, Article 22(3).

<sup>152</sup> Adoption and Children Act 2002, ss 56-65 and ch 5. See Bainham, *Children: The Modern Law*, at pp 301-306 for a summary.



establish and develop relations with others'.<sup>153</sup> Thus as one scholar has noted this right could be used to extend the 'accepted principle that an individual has the right to access information about his or her genetic parentage'.<sup>154</sup>

Any rights possessed by an adopted child relating to knowledge of his or her origins or establishing and developing relations with others could clearly provide support for post-adoption contact. In *Re J* the Court of Appeal did not consider whether these rights would be affected by their refusal of the order. It is of course questionable whether the provision of a photograph to the parents would really enable the child to know her origins or to develop relations with her natural parents, particularly given the one-way nature of the transaction. However, Judge Corrie thought that there was some correlation. Although he did not express this in Article 8 terms, he held that J had an interest in her natural parents maintaining contact with her.<sup>155</sup> Moreover, whilst the order sought may not have provided the strongest basis on which to argue that its refusal would infringe the child's right, one could argue that all post-adoption contact provides a mechanism by which a child can know of his or her origins and through which a child can develop relations with his or her natural parents and therefore that all restrictions need to be considered in the light of the child's right. Of course that would entail a fundamental shift in the domestic courts' reasoning in post-adoption contact cases.

#### The right to one's image

On the other hand, a child's Article 8 right to his or her image may well be engaged by an order mandating the dissemination of the child's photograph for viewing or retention by the child's natural parents. In a series of cases the European Court of Human Rights has increased the protection afforded by Article 8 to individuals captured in photographs.<sup>156</sup> The court has held that taking, retaining or disseminating photographs of an individual can engage the right.<sup>157</sup> Indeed in *Reklos and Davourlis v Greece* the court provided protection by stating that the right is engaged at

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<sup>153</sup> This right has been invoked by the Court in a broad range of cases, including cases: involving issues relating to adoption (usually cases involving discrimination against homosexuals wanting to adopt: see *Fretté v France* (2004) 38 EHRR 21; and *EB v France* (2008) 47 EHRR 21); and the right to discover information about one's biological origins (see *Odièvre v France* (2004) 38 EHRR 43). It should be noted that the right to establish and develop relations with others could arguably apply *vis-à-vis* the adopted child and her adoptive parents. This would mirror the argument made at n 148.

<sup>154</sup> Harris-Short, 'Making and Breaking Family Life', at p 39.

<sup>155</sup> [2010] EWCA Civ 581, at [17].

<sup>156</sup> See *Von Hannover v Germany* (2005) 40 EHRR 1; *Sciacca v Italy* (2006) 43 EHRR 20; *Egeland and Hanseid v Norway* (2010) 50 EHRR 2.

<sup>157</sup> For discussion see K Hughes, 'Photographs in Public Places and Privacy' (2009) 1 *Journal of Media Law* 159.

the point at which a photograph is *taken* without the consent of the person captured in the photograph.<sup>158</sup> The court also held that a photographer violated a child's Article 8 right by *retaining* the images and negatives. Given these developments one has to ask whether a child's Article 8 right to respect for private life, or more specifically the child's right to 'one's image'<sup>159</sup> would be engaged by a post-adoption order requiring the disclosure of an annual photograph to the natural parents. Moreover, if the child's Article 8 right is engaged then the court would have to consider whether this interference was justified in deciding whether to grant the order.

The question whether the natural mother should retain the photographs of J lay at the heart of the Court of Appeal decision. Ultimately the court distinguished between *viewing* and *retaining* photographs because it reflected the wishes of the adoptive parents.<sup>160</sup> However, we will argue that the distinction may well be justified on Article 8 grounds, partly because the Strasbourg Court has ruled that retention interferes with Article 8 (whereas it is questionable whether viewing engages the right), and partly because parental consent has a role to play in determining whether the right is engaged. Thus, whilst it was not discussed in *Re J*, the court's deference to the adoptive parents' wishes could be justified by reference to the child's Article 8 right to one's image.

We will deal first with the issues relating to retention of images before turning to those relating to viewing. The European Court expressly dealt with the retention of photographs in *Reklos*. In that case, a professional photographer working in a hospital took photographs of a baby in a sterile unit which he sought to sell to the child's parents. The parents objected to the photographs having been taken without their consent and demanded that the photographer hand over the photographs and the negatives. The photographer refused to do so, and the parents brought legal proceedings on the basis that the photographer had infringed the personality rights of their child. The parents lodged an application with the European Court of Human Rights based primarily on the child's Article 8 right.<sup>161</sup> The court held that the child's right had been violated and it made a number of important statements which are relevant to *Re J*. First, the court noted that one's image is one of the most fundamental elements of one's personal development and that it is essential that an individual can control his or her image. In order to exercise that control it was held that one must not only have the opportunity to refuse to consent to one's image being published, but also to oppose the taking,

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<sup>158</sup> *Reklos and Davourlis v Greece* [2009] EMLR 16.

<sup>159</sup> *Ibid.*

<sup>160</sup> [2010] EWCA Civ 581, at [38].

<sup>161</sup> [2009] EMLR 16, at [29].

conservation or reproduction of one's image by another.<sup>162</sup> The court explained that this was necessary because '[o]therwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image'.<sup>163</sup> Thus the court was concerned not only with the initial act of taking the photograph, but also with the loss of control that an individual would experience if the images were retained by others. Moreover, it is clear from *Reklos* that where the person photographed is a minor the child's parents should oversee the exercise of the child's right.<sup>164</sup>

This suggests that the child's right would be engaged if the natural mother was permitted to retain photographs of J contrary to the adoptive parents' wishes. Moreover, it is important to note that the problem identified by the Strasbourg Court, namely the possibility that the photograph will be subsequently used against the wishes of the parents,<sup>165</sup> mirrors the concerns of the adoptive parents in *Re J*.<sup>166</sup>

However, it is necessary to highlight a difference between *Reklos* and *Re J*, namely that in *Reklos* the photographer had unlawfully taken the photographs. It therefore had to follow that the retention of the photographs was also unlawful, whereas in *Re J* the natural mother would not have been retaining photographs that she had herself taken. The European Court of Human Rights has not dealt with any cases concerning the retention of photographs taken by another. However, it may be that this factual difference does not affect the outcome – if consent is required where the photographs are retained by a photographer, consent may also be required where photographs are retained by another. In the latter scenario it may be more difficult to identify (in the vast majority of cases where photographs are subsequently acquired by individuals other than the original photographer) at what point consent would be required. However, in *Re J* the court was faced with a relatively easy scenario because it had the adoptive parents before it and presumably they would be taking the photographs. The court knew that the adoptive parents did not consent to the natural mother retaining photographs of J and therefore it seems to follow from *Reklos* that the court would have interfered with J's Article 8 right if it had made such an order. Of course the court would have had to consider whether that interference was justified under Article 8(2), and in doing so it would have had to consider the rights of others which (as noted above) may have included the Article 8

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<sup>162</sup> Ibid, at [40].

<sup>163</sup> Ibid.

<sup>164</sup> Ibid, at [41].

<sup>165</sup> Ibid, at [42].

<sup>166</sup> [2010] EWCA Civ 581, at [12].

rights of the natural parents. Moreover, the child's own right to respect for family life with the natural parents would also need to be balanced against her right to her image.

Having looked at the implications of retention we must now consider whether the order of the court (namely that the natural parent should be allowed to view photographs of J) was compatible with Article 8. There is no Strasbourg jurisprudence stating that *viewing* a photograph of an individual violates Article 8. Such a statement would clearly render Article 8 capable of very broad application, and would be unworkable if it applied to images disseminated in newspapers, in magazines, or on the internet. Moreover, one may argue that it is unnecessary to bring *viewing* within the scope of Article 8 because the right captures the dissemination of a photograph. Since the person distributing or making the photograph available for viewing would be caught by Article 8, it is arguably unnecessary to also attach liability to the person viewing the photograph.

Strasbourg jurisprudence is often jejune. However, we would hope that if the court ever rules that viewing a photograph engages Article 8 in any given case, it would give reasons why that particular viewing triggered the right rather than holding that the viewing of any photograph engages the right. Sadly in the court's jurisprudence on photographs thus far it has not provided such nuanced analysis and it has simply stated that the publication of a photograph or the taking of a photograph engages the right.<sup>167</sup> It is worth giving some consideration to the question whether there is anything about the particular type of viewing in *Re J* that particularly justifies a finding that Article 8 should be engaged. We believe that there are some unique features to this scenario, meaning that it is more likely that this type of viewing would trigger the Convention right. First, this is a photograph of an identified individual. Second, it concerns a photograph of a child. Third, *Re J* involves the annual, organised, private viewing of photographs of a specific individual using a court order. Moreover, in addition to the special type of viewing, one also needs to consider that the court order involves the adoptive parents taking and disseminating (to the natural mother) photographs of the child. Viewing is the next stage in the life cycle of a photograph. It follows the taking, retention and dissemination of a photograph – stages which the Strasbourg Court has already found to trigger Article 8. Thus, whilst Article 8 may not be engaged by the *viewing* of the photograph, the creation and dissemination of the photograph may engage the right.

In the absence of jurisprudence on this issue the Court of Appeal's distinction between viewing and retaining photographs may be justified on the ground that viewing a photograph does not trigger Article 8. However, as noted above, caution is required. There are a number of complex issues

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<sup>167</sup> For discussion see K Hughes, 'Photographs in Public Places and Privacy'.

underpinning such orders and the courts need to engage with the human rights implications of them. Finally we would note that whilst in this case the Strasbourg jurisprudence suggests deference to the wishes of the child's parents (which as a matter of English law would be the child's adoptive parents), we cannot emphasise strongly enough that this is a direct result of the specific approach taken to photographs by the Strasbourg Court. This does not mean that courts should assimilate the child's Article 8 rights with the wishes of the adoptive parents as a general principle. Indeed, as a matter of English law parental consent would always be subject to the jurisdiction of the family courts.<sup>168</sup>

## Conclusion

Overall, the Court of Appeal probably reached the right conclusion in *Re J*. Given that the natural parents would be allowed to view photographs of the child and to participate in letterbox contact, the refusal to order that the natural parents should retain the photographs perhaps struck an appropriate balance between the competing rights and interests in this case. However, we are troubled by the sparseness of judicial reasoning in post-adoption contact cases, and the use of *ex tempore* judgments like Judge Corrie's at first instance in *Re J* hardly helps matters. Post-adoption cases raise a number of complex questions and many of these questions were either not considered in *Re J*, or were not considered fully. We have explored key questions deriving from the facts of *Re J*, arguing that the courts need to recalibrate their reasoning processes in post-adoption contact cases in the Human Rights Act 1998 era.

The first question was whether the appropriate legislative basis for post-adoption contact cases is the Children Act or the Adoption and Children Act. The Court of Appeal was correct to conclude that the Children Act applied in *Re J*. However, whilst it is perhaps doubtful that the court's conclusion would have been affected by the application of the 2002 Act, we suggested that the court was too quick to dismiss the relevance of the 2002 Act to post-adoption contact. There is a danger that the courts will fail to give adequate weight to the child's interests in retaining ties with his or her birth family as part of their assessment of the child's welfare, as required by the 2002 Act.

The problem is compounded by the fact that courts are extremely deferential to the wishes of the adoptive parents. The court's assertion – that only in extremely unusual circumstances should an order be made contrary to the wishes of the adoptive parents – risks prioritising the adoptive parents over the welfare of the child (including her interests in maintaining some link with her parents).

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<sup>168</sup> See, eg, *Re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1.

Moreover, it also fails to give sufficient weight to the rights of the various parties, including those of the child and the natural parents.

We then turned explicitly to the human rights arguments, although of course these overlap with considerations of welfare. We considered both whether natural parents retain a right to respect for family life *vis-à-vis* their children post-adoption and whether the converse is true. This is an unresolved issue in Strasbourg jurisprudence. However, given the shift in adoption policy, Article 8 could be developed further to accommodate post-adoption contact within the meaning of the right to respect for family life. Indeed, if this were the case then both the natural parents and the child may be able to rely upon this provision.

Finally, we considered the relevance of the right to respect for private life to the order sought. Whilst there may be an argument that the natural parents' right to respect for private life could cover the scenario, this is speculative and should not undermine the further development of the family life provision. We then identified two relevant facets of the child's right to respect for private life. The first was the child's right to know of his or her origins, which perhaps provides the strongest support for post-adoption contact. On the other hand, the child's right to his or her image pulls in the opposite direction. The Strasbourg jurisprudence has provided strong protection to individuals captured in photographs in recent cases. Thus there is an argument that the child's right to respect for her image would have been engaged by a court order mandating that the child's natural parents could retain images of her. Furthermore, Strasbourg jurisprudence suggests that a child's parents have to consent to photographs of their child being taken or retained. This reasoning would indirectly support the Court of Appeal's deference to the child's adoptive parents, albeit on a rather different basis.

It is therefore apparent that there are a number of rights and interests at stake in *Re J* and similar cases, which the courts need to identify. Once they have done so, they also need explicitly to strike an appropriate balance between these conflicting rights and interests. Given this obligation, it may be problematic that the Court of Appeal indicated that some of the parties in the case should not have had separate legal representation, although it is not clear from the judgment what the father himself hoped to gain from the proceedings.

The result of all this is that there is much work to be done in post-adoption cases. There is a real need for the courts to get to grips with the human rights implications of these cases and to consider the relationship between each of these competing rights, and the relationship between these rights and the welfare provisions of the 1989 and 2002 Acts. Moreover, the courts need to be more open to

post-adoption contact generally.